In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1422

PETER J. MARTINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he received ineffective assistance of counsel at trial.

Following a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted on two counts of using interstate telephone facilities to promote gambling activities and one count of conspiring to commit that offense, in violation of 18 U.S.C. 2, 1952, and 371. He was sentenced to consecutive terms of two years' imprisonment on the first two counts and to a suspended sentence and five years' probation on the third count. The court of appeals

affirmed *per curiam* (459 F. 2d 1032), and this Court denied certiorari (409 U.S. 1116).[1]

Petitioner thereafter filed the present motion to vacate his sentence, pursuant to 28 U.S.C. 2255 (Pet. App. 19-29). He alleged that his trial counsel's alcoholism so far impaired his capacity to function as an attorney that petitioner was deprived of the effective assistance of counsel. After a hearing, the district court denied the motion (*id.* at 3-12).

The court detailed counsel's vigorous representation of petitioner (*id.* at 5-6). It found that counsel "conducted himself with all propriety and very effectively and with great zeal in behalf of the best interest of his client" (*id.* at 6). The court was "favorably impressed with his industry and ingenuity in presenting his points" (*ibid.*). "During and throughout the entire course of these hearings and trial of this case the Court observed nothing but skilled representation by counsel at all times in the highest tradition of professional legal service" (*id.* at 8). Counsel's questions and objections "conclusively show that he was extremely alert and on his toes at all times during this trial" (*id.* at 11).

The district court thus concluded that "petitioner has had the benefit of effective counsel during and throughout the entire course of this litigation" (*id.* at 12) and that his motion to vacate his sentence "is completely without

---

[1]As recounted in our memorandum in opposition to that certiorari petition (No. 72-584), the evidence at petitioner's trial showed that the 406 Club, located in Biloxi, Mississippi, was operated by petitioner as a bookmaking and gambling operation from July 1962 to March 1966. The activities conducted in the club included card games and wagering on horse races and other sporting events. During this time and continuing until January 1970, a Western Union telegraph machine was installed on the premises. The machine, commonly called a "sports ticker," relayed sporting results from Chicago, Illinois, to the club. Sports scores received on the telegraph tape were posted on a board, and the tape itself was used at the betting window for determining winners.

merit" (*id.* at 6). The court of appeals affirmed the denial of petitioner's motion (*id.* at 1, 2).

Though petitioner claims that there is a conflict among the courts of appeals over the proper standards for determining whether a defendant has been deprived of the effective assistance of counsel (Pet. 8-10), the district court's findings show that petitioner received competent and vigorous representation, notwithstanding his attorney's alleged drinking habits, and that he was not deprived of the effective assistance of counsel under any standard.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

DOJ-1974-05